



## **Case Summary**

Appellant-Defendant Timothy K. Bott (“Bott”) appeals the trial court’s denial of his motion for discharge pursuant to Criminal Rule 4(c). We reverse.

## **Issue**

Bott has raised one issue which we restate as whether Bott should be discharged pursuant to Criminal Rule 4(c) where his trial was conducted three and a quarter years after he was initially charged and where he objected timely to the trial setting.

## **Facts and Procedural History**

On July 21, 2002, Bott drove without a secured seatbelt and turned in front of a vehicle. Officer Chris Christian (“Officer Christian”) detained Bott and noticed that Bott smelled of alcohol and slurred his speech. Officer Christian conducted three field sobriety tests, all of which Bott failed. Officer Christian placed Bott under arrest. On July 22, 2002, the State charged Bott in Anderson City Court with operating a vehicle while intoxicated,<sup>1</sup> lacking financial responsibility,<sup>2</sup> having an open container in the passenger compartment,<sup>3</sup> moving unsafely and without signal from lane to lane,<sup>4</sup> and failing to use a passenger restraint in the front seat.<sup>5</sup> On August 20, 2002, the State moved to dismiss all five counts.

On November 22, 2002, the State charged Bott with operating a vehicle while

---

<sup>1</sup> Ind. Code § 9-30-5-2.

<sup>2</sup> Ind. Code § 9-25-8-2(a).

<sup>3</sup> Ind. Code § 9-30-15-3.

<sup>4</sup> Ind. Code § 9-21-8-24.

intoxicated as a Class C misdemeanor<sup>6</sup> and alleged he is a habitual substance offender.<sup>7</sup> At the initial hearing on January 24, 2003, Bott failed to appear because he was incarcerated. His arrest in this case constituted a probation violation on unrelated charges in the same county. As a result, the court issued an arrest warrant for Bott. Bott admitted that his uncle received the warrant, but his uncle failed to inform him, assuming that it concerned the unrelated charges for which he was incarcerated at the time. On April 30, 2003, Bott appeared in court, and explained his prior absence. On May 9, 2003, the State amended its information to include a count for operating a vehicle while intoxicated as a Class D felony.<sup>8</sup>

On Tuesday,<sup>9</sup> October 21, 2003, at the last of three pre-trial conferences, the parties appeared and requested a trial date. The Chronological Case Summary reflects that on that date, the trial court set trial for April 1, 2004.

On December 8, 2003, Bott moved to dismiss the charges, alleging a violation of Criminal Rule 4(c). At the conclusion of a hearing on January 20, 2004, the trial court denied Bott's motion to dismiss. Meanwhile, the trial remained scheduled to occur on April 1, 2004.

On February 17, 2004, Bott moved for certification of an interlocutory order on the motion to dismiss. The trial court granted certification. Prior to a ruling by this Court on the interlocutory order, the trial court reset Bott's trial due to congestion of the court calendar.

---

<sup>5</sup> Ind. Code § 9-19-10-2.

<sup>6</sup> Ind. Code § 9-30-5-2(a).

<sup>7</sup> Ind. Code § 35-50-2-10(b).

<sup>8</sup> Ind. Code § 9-30-5-3.

<sup>9</sup> We take judicial notice that October 21, 2003 occurred on a Tuesday.

On May 11, 2004, this Court declined to accept jurisdiction of the interlocutory appeal. The trial court twice more reset the trial date due to congestion. Ultimately, the case was tried on October 18, 2005. In absentia, Bott was found guilty as charged and adjudicated a habitual substance offender. Bott received consecutive sentences of three and five years, three of which were suspended. He now appeals.

## **Discussion and Decision**

### **I. The Trial was not Held within 365 Days**

We review the denial of a motion to dismiss for an abuse of discretion. Murphy v. State, 837 N.E.2d 591, 593 (Ind. Ct. App. 2005). “In so reviewing a trial court’s decision, we reverse only where the decision is clearly against the logic and effect of the facts and circumstances.” Id.

Bott contends that the passage of 1184 days (approximately three and a quarter years) between the initial filing of charges and his trial violated Criminal Rule 4(c).<sup>10</sup> The right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 12 of the Indiana Constitution. U.S. CONST. amend. VI, and IND. CONST. art. I, § 12. “This ‘fundamental principle of constitutional law’ has long been zealously guarded by our courts.” Cole v. State, 780 N.E.2d 394, 396 (Ind. Ct. App. 2002), trans. denied (quoting Castle v. State, 237 Ind. 83, 143 N.E.2d 570, 572 (1957)).

---

<sup>10</sup> We note that Bott once referenced the Sixth Amendment to the federal Constitution in his brief. Bott, however, failed to develop a constitutional argument or to support that argument with citations to authority or the Appendix, as required by Indiana Appellate Rule 46(A)(8)(a) (“Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.”). Neither did Bott argue in his briefs or in his written or oral motions to dismiss that the trial date, delayed because of congestion, was unreasonable, pursuant to Criminal Rule 4(c). Therefore, we confine our analysis to the one-year provision of Criminal Rule 4(c).

Indiana Criminal Rule 4(c) codifies and further protects this right.

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

The purpose of Criminal Rule 4(c) is to facilitate early trials and not to discharge defendants. Pond v. State, 808 N.E.2d 718, 722 (Ind. Ct. App. 2004), trans. denied (citing State v. Hurst, 688 N.E.2d 402, 408 (Ind. 1997), overruled on other grounds). The burden is upon the State, not the defendant, to bring a defendant to trial within one year. Rust v. State, 792 N.E.2d 616, 618 (Ind. Ct. App. 2003) (citing Hurst, 688 N.E.2d at 408), trans. vacated and denied. Nonetheless, the defendant does have a duty to argue timely that a particular trial date, once set, would violate Criminal Rule 4(c). State of Indiana ex rel. Michael Shane Bramley, Relator v. Tipton Circuit Court, 835 N.E.2d 479, 481 (Ind. 2005) (citing Vermillion v. State, 719 N.E.2d 1201, 1204 (Ind. 1999)). This achieves the desired result that trial courts, once notified that a particular date might violate Criminal Rule 4(c), would still have an opportunity to secure an earlier trial date.

We initially observe that the State's dismissal of the charges on August 20, 2002 tolled, but did not reset, the one-year computation until the new charges were filed on

November 22, 2002. See Sweeney v. State, 704 N.E.2d 86 (Ind. 1998). See also Stinson v. State, 797 N.E.2d 352 (Ind. Ct. App. 2003). Accordingly, the dismissal tolled the one-year computation for 94 days.

By the rule's plain language, neither delays caused by Bott, nor continuances of trial based upon findings of congestion are to be included in the one-year computation. Ind. Crim. Rule 4(c). See also Cook v. State, 810 N.E.2d 1064, 1067 (Ind. 2004) ("We therefore hold that delays caused by action taken by the defendant are chargeable to the defendant regardless of whether a trial date has been set.") and Covelli v. State, 579 N.E.2d 466 (Ind. Ct. App. 1991) ("The delay occasioned by Covelli's pursuance of his interlocutory appeal is chargeable to him.").

The State alleges that Bott caused a series of delays in the course of the prosecution. First, Bott failed to appear at a hearing on January 24, 2003. At the time, Bott was incarcerated because his arrest in this case had constituted a probation violation on unrelated charges in the same county. The trial court issued a warrant for his arrest. He later testified that the warrant was delivered to the correct address, but that his uncle had not informed him of it, assuming that the warrant concerned the charges for which he was incarcerated. Meanwhile, the State proceeded as if Bott had been served.

The State contends that it should not be charged for this time, arguing that it lacked actual knowledge of Bott's incarceration, and that knowledge of Bott's whereabouts should not be imputed to the State simply because he was incarcerated in the same county. Bott, however, alleges that the county prosecutor's office should be held responsible for

understanding whom it has incarcerated.

For situations in which the defendant is incarcerated for unrelated charges arising in another county, “‘arrest’ for purposes of Ind.R.Crim.P. 4(A) and (C) does not occur until his return is ordered by the court wherein the second charges have been filed.” Rust, 792 N.E.2d at 618, 619 (citing Landrum v. State, 428 N.E.2d 1228, 1230 (Ind. 1981)). Where a prosecution was “midstream,” however, two cases give guidance on what constitutes notice to the prosecution of defendant’s incarceration such that the Criminal Rule 4(c) clock begins again to tick.

In Rust, the defendant was arrested in Hancock County and released on bond. He then was arrested in Marion County and appeared at the initial hearing. He failed to appear for subsequent hearings in both counties. Rust surrendered himself in Hancock County, filing a notice of surrender in Marion County. This Court distinguished Landrum, noting that the Marion County case was “midstream.” Id. at 620. Rust held that “once the trial court and the State were notified via the Notice of Surrender where Rust was incarcerated, the State was obligated to proceed with the case in a timely manner.” Id.

In contrast, this Court considered telephone calls inadequate notice for purposes of restarting the Criminal Rule 4(c) clock. In Werner v. State, the defendant was arrested and appeared at an initial hearing in Randolph County. He then was arrested on unrelated charges and incarcerated in Wayne County. On Werner’s behalf, someone called the clerk and the bailiff in Randolph County, notifying them that the defendant was incarcerated in Wayne County. The Werner Court held that, where a case is midstream and the defendant is

incarcerated in another county on unrelated charges, the defendant “must provide formal written notice of his incarceration to the court and the State to avoid the tolling of the Rule 4(c) clock.” Werner v. State, 818 N.E.2d 26, 31 (Ind. Ct. App. 2004), trans. denied.

Here, Bott was on probation for technically unrelated charges<sup>11</sup> filed in Anderson city court. His arrest in Madison County for the charges in this case was the basis for the probation violation for which he was incarcerated. We conclude under these circumstances that Bott did not cause the 96-day delay following his failure to appear. Therefore, the State is chargeable for this time.

Further, Bott filed two potentially dispositive motions, only one of which caused a delay of the trial date. First, Bott moved to dismiss. In a hearing on the motion held 43 days later, on January 20, 2004, the trial court denied Bott’s motion. The trial court made clear, however, that the trial remained scheduled for April 1, 2004, allowing the parties more than two months to prepare for trial. Accordingly, we conclude that litigation of Bott’s motion to dismiss did not cause a delay of trial. The 43 days spent litigating Bott’s motion to dismiss are chargeable to the State.

Second, Bott moved successfully for an interlocutory order from the trial court; however, this Court ultimately declined to accept jurisdiction. While that matter was being considered, the initial trial date passed, and the trial court issued the first of three rulings that a congested calendar required postponing the trial date. The time from Bott’s motion for certification of an interlocutory order until his ultimate trial date accounts for a 609-day

delay. These days are not chargeable to the State. In total, there are 703 days by which the Criminal Rule 4(c) one-year computation should be either tolled or extended. ( $94 + 609 = 703$ )

From the initial filing of charges until Bott's trial, 1184 days passed. Of these, 703 are not chargeable to the State, leaving 481. ( $1184 - 703 = 481$ .) Even if Bott were held responsible for the 96 days following his failure to appear, there still would remain 385 days chargeable to the State. ( $481 - 96 = 385$ .) Clearly, the trial was not held within the guidelines of Criminal Rule 4(c).

## II. Bott Objected Timely

Because the trial occurred beyond the requirements of Criminal Rule 4(c), the critical issue in this case is whether Bott objected timely to the trial court's setting of the trial date. It is well settled that a defendant has no duty to prompt or notify the trial court or the State that a violation of Criminal Rule 4(c) is imminent. See Rust, 792 N.E.2d at 618. However, where a trial court acts within 365 days chargeable to the State to set a trial outside that time, the defendant must object timely. Failure to do so waives the issue. See Bramley, 835 N.E.2d at 481 and Vermillion, 719 N.E.2d at 1204.<sup>12</sup>

On Tuesday, October 21, 2003, the parties appeared at the final pre-trial conference. That was the 362<sup>nd</sup> day chargeable to the State, including: 29 days following the initial filing

---

<sup>11</sup> Bott was on probation for operating a vehicle while intoxicated. Transcript at 191. In this case, he was adjudicated an habitual substance offender.

<sup>12</sup> See also Rivers v. State, 777 N.E.2d 51, 55 (Ind. Ct. App. 2002) ("Here, the trial court acted within the one-year period to set Rivers' trial outside the one-year period on June 28, 1999. Rivers did not object to the setting of the trial. Rivers' failure to object waived his right to a trial within the one-year period of Criminal Rule 4(c) and constituted acquiescence to the later trial date.")

of charges, 63 days following the re-filing of charges, 96 days following Bott's failure to appear, and 174 days following Bott's appearance at the hearing in which he explained his prior absence. (29 + 63 + 96 + 174 = 362.) Unable to reach a settlement, the parties asked the trial court to set a trial date. The chronological case summary entry shows that the trial court, acting that day, scheduled the trial to be held April 1, 2004.<sup>13</sup>

Other evidence in the record, however, establishes ambiguity as to when the parties actually received notice of the trial date. The State suggested in written and oral argument on Bott's motion to dismiss that "it was the [c]ourt's custom and practice to issue the trial date via notice to the parties after a trial request is made at the final pre-trial conference." App. at 18. Further, the trial court confirmed that written notice would have followed the pre-trial conference, and that the timing of such notice would have been dependent on the court reporter's workload. The State's brief acknowledges that notice was sent following the hearing and that "there is no indication on the record when the parties received such notice." Appellee's Brief at 4. Finally, in oral argument on the motion to dismiss, the State acknowledged not knowing when the parties actually received notice. The record does not establish when Bott learned of the April 1, 2004 trial date.

In written and oral argument on Bott's motion to dismiss, the State argued that Bott should have objected at the final pre-trial conference, knowing that it was the trial court's custom and practice to send written notices after the hearing. This argument is misplaced.

---

<sup>13</sup> The Chronological Case Summary entry for that date reads, "Parties appear. Final pre-trial held. No agreement reached. The Court now sets this matter for trial by jury on 4/1/04 at 9:00a.m., with jury selection beginning 3/31/04 at 9:00a.m. . . . (Notice: State/[Bott's attorney]) cc"

The burden is upon the State, not the defendant, to bring the case to trial within one year. Rust, 792 N.E.2d 616.

The final pre-trial conference occurred just three days before the one-year deadline for conducting Bott's trial, and the record does not establish when Bott received actual notice of the trial date. This is simply not a timeframe by which due process would allow Bott to object within the one-year period.<sup>14</sup>

If the record had clearly established that the parties were informed of the trial date during the final pre-trial conference, it would have been incumbent upon Bott to object. The trial court would then have had the option of hearing the case later that week, or evaluating the court calendar to determine whether there was a basis for scheduling a later trial date due to congestion. Without evidence that Bott received actual notice of the trial date within the required time, we conclude that his objection, filed 48 days after the final pre-trial conference, was timely.

### **Conclusion**

For the reasons discussed above, the trial court abused its discretion in denying Bott's motion to dismiss.

Reversed.

KIRSCH, C.J., and CRONE, J., concur.

---

<sup>14</sup> As noted above, we conclude that the 96-day period following Bott's failure to appear due to incarceration should be charged to the State. If this delay were to be charged to the defendant, however, it would be even more clear that his objection was timely.